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The Highway Cases: Noise as a Taking or Damaging of Property in California

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COMMENTS

THE HIGHWAY CASES: NOISE AS A TAKING OR DAMAGING OF PROPERTY IN CALIFORNIA

INTRODUCTION

The rise of the industrial age has been accompanied by a significant increase in noise from public transportation sources.[1] The clip-clop of horse hooves and squeak of carriage wheels have been replaced by the intrusive and pervasive noises produced by increasing numbers of automobiles on freeways that are more and more congested. The evolution of the airplane has been accompanied by a similar increase in the amount of noise generated;[2] the sonic boom may be the most destructive form of noise ever encountered. While the effects of this noise are still being studied, it has been established that noise directly affects man's circulatory, reproductive, and nervous systems. Noise may also promote psychological problems such as chronic fear, sleep loss, anxiety, and in extreme cases, psychoses, hallucinations, and suicidal tendencies.[3]

The response of the law to noise pollution has been uncertain. Inverse condemnation has been the most popular cause of action recently, but it has been inconsistently applied. In many cases, for example, recovery is allowed under inverse condemnation for airport noise, whether or not there is a taking of airspace by direct overflights. However, although "traffic is seen to be generally . . . the highest ranking conscious noise source,"[4] people who complain in court of surface

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1. *See generally* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1373-74 (1965).

2. *Id.*

3. Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 HARV. J. LEGIS. 533-34 (1970); for a more in-depth discussion, *see also* C. BRADDON, NOISE POLLUTION—THE UNQUIET CRISIS 63-90 (1970).

4. U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, NOISE IN URBAN AND SUBURBAN AREAS: RESULTS OF FIELD STUDIES 1, 6 (1967).

traffic noise are denied recovery in inverse condemnation unless they establish a physical appropriation of their property. The highway cases seem to be the only group in which a physical taking is required before there can be any recovery for consequential damages such as noise.

The prevailing view in the highway cases has been widely criticized.[5] There are now indications that the law in California is changing, as at least one lower court has chafed at applying the physical appropriation theory. This comment will undertake an evaluation of the application of inverse condemnation by the courts of California in highway cases where there is no actual physical appropriation of land. The primary vehicle for this evaluation will be a comparison with the application of inverse condemnation throughout the country in airport noise cases. California courts are moving toward a new standard for a taking or damaging of property by highway noise that is more consistent with the airport cases; under this new standard, a taking or damaging of property occurs whenever the noise causes a substantial and unreasonable interference with enjoyment of property, thereby amounting to a nuisance.

In order to facilitate discussion of the problem, it is helpful to delineate three common factual situations. Situation 1 (classic physical taking): The state condemns part of a person's property in an eminent domain proceeding for highway construction purposes. The highway is constructed *on the very land condemned.* The property owner later sues the state for consequential "severance damages" resulting from noise

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5. *See, e.g.*, T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 462-63 (2d ed. 1874):

> I cannot refrain from the expression of the opinion, that this limitation of the term, *taking*, to the actual physical appropriation of property or a divesting of title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of government.
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> The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that, in point of fact, the owner is deprived of property, though a particular piece of property may not be actually taken.

which is caused by the construction and operation of the highway.[6] Situation 2 (quasi-taking): The state condemns part of a person's property for highway construction purposes. The highway itself *does not actually pass over* the land taken (*e.g.*, the condemned portion of land is used for building a cul-de-sac that does not itself produce the offensive effects). The property owner later sues the state for damages caused by noise resulting from the construction and operation of the roadway. Situation 3 (no physical taking): The state constructs a highway that abuts or passes very close to a person's property. There is thus *no physical appropriation* of land. The property owner later sues in inverse condemnation for damages caused by noise resulting from the construction and operation of the highway. Although this comment is primarily directed at type-3 (no physical taking) situations, reference will be made to type-1 (classic physical taking) and type-2 (quasi-taking) situations for purposes of comparison.

THE HIGHWAY CASES

The Theory: Inverse Condemnation

An inverse condemnation action is an eminent domain proceeding which is brought by the property owner rather than the state, to recover the value of property that was taken for public purposes without a condemnation proceeding.[7] The principles that affect the rights of the parties are the same as in an eminent domain proceeding.[8] Inverse condemnation is thus an action that is grounded in either the state or federal constitutions. While the federal and some state constitutions provide for recovery only when property is "taken,"[9] other states, including California, allow recovery whenever property is "taken or damaged."[10] Although the purpose of the "or

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6. Where part of a parcel of real property is taken, severance damages include those damages caused to the remainder of the property by the construction and operation of the improvement that necessitated the taking. They may be shown by proving the market value of the remainder before and after the taking. People v. Loop, 127 Cal. App. 2d 786, 799, 274 P.2d 885, 895 (1954).

7. *See generally* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 730-31 (1967).

8. *Id.*

9. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

10. "Private property may be taken *or damaged* for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into

damaged" language was ostensibly to liberalize the law of compensation for non-physical interference such as noise,[11] this has not been the result in the highway cases.[12]

Although inverse condemnation is a constitutional cause of action, decisions are fundamentally based on two competing policy considerations:[13] the even distribution of the cost of public improvements so that one person is not required to shoulder more than his share of the burden,[14] and, alternatively, a refusal to allow compensation to be so liberally granted that government projects become excessively costly.[15] And, as discussed below, when policy goals of society change with regard to which public improvements are most needed and desirable, this change should be reflected in the application of inverse condemnation.[16]

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court for, the owner. . . ." (Emphasis added.) CAL. CONST. art. 1, § 19.

11. Van Alstyne, *supra* note 7, at 775. *See also* Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 223 (1967).

12. *See* Spater, *supra* note 1, at 1401-02.

13. Bacich v. Bd. of Control of Cal., 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943). *See also* Van Alstyne, *supra* note 7, at 732-33. The reason for the emerging importance of policy questions in inverse condemnation actions is that legal reasoning based on interpretations of constitutional terms has been abstract, circular, and inconsistent.

> Is the plaintiff's interest one that fits within the accepted concepts of "property"? If so, has anything legally cognizable been "taken" or "damaged"? Was the loss visited on plaintiff for a "public use"? How is "just compensation" to be determined, and what elements of loss are included in its computation? Sharp divisions of judicial opinion on questions pitched at this level of inquiry might readily be expected, and, indeed, they permeate the case law . . . . In California, however, the relevant policy postulates have increasingly been exposed to view by appellate judges as the courts have labored to construct a viable body of consistent principles in recent years.

Id.

14. 23 Cal. 2d at 350, 144 P.2d at 823. One court has even said: "The *decisive consideration* is whether the owner of the damaged property, if uncompensated would contribute more than his proper share to the public undertaking." (Emphasis added.) Clement v. State Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

15. 23 Cal. 2d at 350, 144 P.2d at 823.

16. "Inverse condemnation epitomizes a struggle between the security of 'established economic interests' and 'the forces of social change' which cannot be rationally resolved by a mere search for definitions." Van Alstyne, *supra* note 7, at 735.

The Symons-Lombardy Rule

People v. Symons[17] was an early landmark case where property owners argued that highway noise constituted a taking or damaging of their property. Although it involved a type-2 (quasi-taking) situation, *Symons* has been cited by later courts as precedent for holdings in type-3 (no physical taking) situations.

Part of Symons' residential lot had been condemned in an eminent domain proceeding for construction of the San Diego Freeway. The condemned property did not become part of the freeway, but was used to construct a cul-de-sac at the end of the street terminated by the freeway. While the trial court allowed damages for the fair market value of the property taken and for damage to Symons' lawn and sprinkler system, it excluded testimony as to decreased market value of the home as a result of noise, fumes, and dust from the freeway.[18]

The California Supreme Court affirmed, holding that there can be no recovery of consequential damages for noise that is caused by the freeway on lands *other than those appropriated for the freeway itself.*[19] There was no case directly on point; therefore the court's holding was based on earlier cases where recovery was sought for consequential damages without any physical appropriation. In widely quoted dictum, the court said:

> It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors . . . there can be no recovery where there has been no actual taking or severance of the claimant's property.[20]

By extending the reasoning of earlier type-3 (no physical taking) situations to a type-2 (quasi-taking) situation, the court indicated that similar principles govern both factual patterns and that the results reached should be identical. Indeed, the logic underlying the result in both situations is similar; in both classes of cases the damage caused by noise and

17. 54 Cal. 2d 855, 357 P.2d 451, 9 Cal. Rptr. 363 (1960).
18. *Id.* at 858, 357 P.2d at 453, 9 Cal. Rptr. at 365.
19. *Id.* at 860, 357 P.2d at 454, 9 Cal. Rptr. at 366.
20. *Id.*

other factors results from "the maintenance and operation of the freeway on lands other than those taken from" the property owner.[21] Despite this logical similarity, *Symons* has been narrowly construed by the California judiciary and completely abrogated by the legislature in type-2 situations, and yet remains intact in its application where no physical appropriation has occurred.[22]

In *Lombardy v. Peter Kiewitt Sons' Co.*[23] a California court of appeal applied *Symons* to a type-3 situation and denied recovery where owners of property adjacent to that used for construction of a freeway filed suit in inverse condemnation. The property owners claimed that, as a proximate result of the construction and operation of the freeway, they sustained injuries and damage to their property caused by the emission of noxious fumes, loud noise and dust. The court sustained a demurrer to the complaint, holding that there was no allegation of damage in a substantial amount, which it equated with physical damage to property.[24] Although it denied recovery, the court admitted that there had been an injury in fact:

> All householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner in varying degrees. The roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic all contribute to the loss of peace and quiet which our forefathers enjoyed before the invention of the gas engine.[25]

Lombardy, like *Symons,* was a decision fundamentally rooted in the competing policy considerations of the eminent domain provision of the California Constitution. Although in

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21. *Id.*

22. *See* text accompanying notes 23-28 *infra.*

23. 266 Cal. App. 2d 599, 72 Cal. Rptr. 240 (1968), *cert. denied,* 394 U.S. 813 (1969).

24. *See* 266 Cal. App. at 602, 72 Cal. Rptr. at 242:

> There was no allegation that the land of plaintiffs had sunk or shifted, the foundations of the houses had sunk, that walls had been cracked, windows broken or that the building had sustained any other type of injury or damage. The allegation that the described acts of defendants have caused "damages" to real property . . . was not an allegation that the real property has sutained damage in any substantial amount.

25. *Id.* at 605, 72 Cal. Rptr. at 244.

both cases the property owners had alleged a reduction in property values caused by the noise, dust, and fumes emanating from the freeway, they were denied recovery for a damaging of property. In effect, the property owners were forced to absorb whatever loss was caused in order that the development of the state transportation system could proceed unimpeded.[26]

The *Symons-Lombardy* line of cases enunciated the rule that, where an offending street or highway is not constructed and operated on land actually taken from the claimant, there may be no recovery under inverse condemnation for noise, dust, noxious odors, and other types of non-physical damage to property, no matter how severe. Recovery has therefore been based not on the extent of harm, but on the fortuitous incidence of a physical taking.[27] And although the rule has been criticized[28] and the opinions narrowly construed by some courts, the scheme remains substantially valid in type-3 situations.

Retreat from Symons

The denial of recovery in type-2 (quasi-taking) situations has been based on *Symons's* implication that type-2 situations should be treated the same as situations where there is no physical appropriation. Current application of *Symons* to type-2 situations is therefore an important indicator of how the rule will be applied in type-3 (no physical taking) situations which may arise in the future.

Two early post-*Symons* decisions applied its rule to type-2 situations and denied recovery. In *People ex rel. Department of Public Works v. Elsmore*,[29] severance damages were denied where part of the claimant's property was taken for freeway purposes, but used only for a cleared strip running alongside the roadbed. Similarly, in *City of Berkeley v. Von Adelung*,[30] a small triangle of land was taken for the widening

26. *Id.* at 604, 72 Cal. Rptr. at 243; *see also* Kramon, *supra* note 3, at 545-46.

27. Van Alstyne, *Intangible Detriment*, 16 U.C.L.A. L. REV. 491, 505 (1969). *See also* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1226-27 (1967).

28. People *ex rel.* Dep't of the Pub. Works v. Volunteers of Am., 21 Cal. App. 3d 111, 117-28, 98 Cal. Rptr. 423, 426-35 (1971).

29. 229 Cal. App. 2d 809, 40 Cal. Rptr. 613 (1964).

30. 214 Cal. App. 2d 791, 29 Cal. Rptr. 802 (1963).

of a street. Defendant's claim for severance damages in the eminent domain proceeding was denied:

> At most, defendant's offered proof would show only that the project as a whole would increase traffic flow past his lot. He offered nothing to show that such increase would either be effected or affected by the taking of a small bit of his property to round off one corner.[31]

However, when the California Supreme Court next considered the *Symons* rule, it expressly overruled *Elsmore,* and announced a less restrictive test for quasi-taking situations. In *People ex rel. Department of Public Works v. Ramos,*[32] an eminent domain action, the state condemned part of Ramos' land for state highway purposes. As in *Symons,* the parcel taken was not used for construction of the freeway proper, but for the construction of a fence on the new property line and for the dirt shoulder of the road. Ramos' claim for severance damages resulting from loss of access, a type of non-physical damage to property, was rejected by the trial court on the basis of *Elsmore.*[33]

The California Supreme Court reversed the lower court and overruled *Elsmore* in a situation where it could easily have affirmed based on a broad reading of *Symons.* Although the freeway itself was not located on Ramos' property, the court ruled that the land taken for the freeway right-of-way was taken for use as part of the freeway and Ramos could therefore claim severance damages for the loss of access.[34]

In *Ramos,* the court construed *Symons* narrowly in a type-2 situation. The phrases "freeway proper" and "freeway itself," as they were used in *Symons,* were held in *Ramos* to include the entire freeway right-of-way. Although the court clung to the notion that a taking was required, its emphasis was less on whether part of the freeway actually passed over the land and more on the actual harm suffered. Carried to its ultimate extreme this reasoning would completely change the law where no physical appropriation occurs.

A further retreat from *Symons* in California is evidenced by *People ex rel. Department of Public Works v. Volunteers*

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31. *Id.* at 793, 29 Cal. Rptr. at 803.
32. 1 Cal. 3d 261, 460 P.2d 992, 81 Cal. Rptr. 792 (1969).
33. *Id.* at 264, 460 P.2d at 994, 81 Cal. Rptr. at 794.
34. *Id.*

of America.[35] Although reaching a result consistent with *Ramos* in a type-2 situation, the California court of appeal delivered a scathing attack on the taking requirement of the prevailing rule:

> [T]he dividing line between those who are entitled to consequential damages and those who are not, is at best arbitrary. On the one hand it can be said that certain diminution of the value of its property resulting to the defendant is no greater than that suffered by neighboring property owners who lost no land by reason of the improvement. . . . By the same token this diminution of value is just as great as that suffered by a landowner who retains an equivalent parcel after giving up a strip of greater width which falls under part or all of the projected improvement . . . .[36]
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> . . . .
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> . . . It is obvious that adjacent property is damaged to the same degree whether no property is taken, whether a mere narrow strip is taken, or whether a substantial portion of the property is taken.[37]

More important, the court directly attacked the policy underpinnings which had supported denials of compensation when no physical appropriation had occurred:

> [W]ith changing concepts of the rights of an individual to his privacy and to enjoy an environment unpolluted by noise, dust, and fumes, it may not be improper to consider whether other means of transportation should be substituted for the private automobile. Any consideration of this question is clouded if the true economic burden of providing freeways for motor vehicle traffic is concealed by requiring adjacent owners to contribute more than their proper share to the public undertaking.[38]

In response to the attacks on *Symons* by *Ramos* and *Volunteers,* the California legislature enacted section 1263.420(b) of the Code of Civil Procedure[39] which allows owners of partially condemned land to recover damages caused by the

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35. 21 Cal. App. 3d 111, 98 Cal. Rptr. 423 (1971).

36. *Id.* at 120, 98 Cal. Rptr. at 429.

37. *Id.* at 127-28, 98 Cal. Rptr. at 435.

38. *Id.* at 128, 98 Cal. Rptr. at 435.

39. The new code section took effect on July 1, 1976. CAL. CIV. PROC. CODE § 1230.065 (West Supp. 1979).

> construction and use of the project for which the property is taken in the manner proposed by the [government], whether or not the damage is caused by a portion of the project located on the part taken.[40]

The Law Revision Commission Comment states:

> Subdivision (b) abrogates the rule in *Symons* by allowing recovery for damages to the remainder caused by the project regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable.[41]

The Commission also cites *Volunteers* for the rule that the "test of compensability is whether the condemnee is obligated to bear more than his 'proper share' of the burden of the public improvement."[42]

Although there was no expressed intent on the part of the legislature to affect the application of *Symons* to type-3 situations, the new statute will influence future decisions in these no physical taking, type-3, cases. As indicated above, *Symons* equated type-3 situations with type-2 situations in holding that the result in each should be the same. More fundamentally, with the passage of section 1263.420(b), the legislature has accepted the general premise that recovery should not depend on the location of the damage-causing street or highway, but whether a person is required to bear more than his share of the cost of public undertakings.

Although a change in judicial thought is taking place, the California courts have considered few highway cases involving type-3 situations in recent years. Therefore, in order to further evaluate the taking requirement and determine the direction the law will move, it is helpful to consider the application of inverse condemnation to cases involving airport noise.

THE AIRPORT CASES

Although the claims of noise sufferers next to highways have been defeated in the absence of a physical taking, this has not been the result when the noise emanates from air traffic. Many states have done away with the requirement of a

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40. CAL. CIV. PROC. CODE § 1263.420(b) (West Supp. 1979).
41. 12 CAL. LAW REV. COMM'N REP. 1836 (1974).
42. *Id.*

direct overflight—analogous to the physical taking requirement of the highway cases—for recovery under inverse condemnation for airport noise. This is particularly true in those states whose constitutions allow recovery for a damaging of property in addition to a taking. Several courts and commentators have suggested that the principle of the airport cases, allowing recovery without direct overflights, is equally applicable to the highway cases.[43]

The Traditional Federal View

The federal courts were the first to attempt the application of inverse condemnation to cases involving noise from airports. The earliest cases applied the law of inverse condemnation in the airport cases much as it is currently applied in the highway cases. However, the principles of the airport cases have evolved in the state courts so that plaintiffs who once were denied recovery on arguments similar to those made in highway cases now often prevail.

The first significant case was *United States v. Causby*.[44] The Causbys were owners of property that included a house and a chicken farm. This property was located near an airport that was leased by the United States government for military purposes. Government airplanes using the airport would fly directly over the Causby's property at low altitudes, causing high noise levels that resulted in loss of sleep, nervousness, and fright, and rendered the property useless as a chicken farm.[45]

The Court held that the Causbys were entitled to compensation for the damage caused by the noise and other incidents of the overflights.[46] It reasoned that there had been a physical taking of property within the meaning of the fifth amendment: "[T]he line of flight is over the land. And the land is appropriated as directly and completely as if it were

43. *See* Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975); People *ex rel.* Dep't of Pub. Works v. Volunteers of America, 21 Cal. App. 3d 111, 98 Cal. Rptr. 423 (1971); Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 216 N.W.2d 651 (1974); Board of Educ. v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (App. Div. 1965), *rev'd on other grounds*, 46 N.J. 522, 218 A.2d 153 (1966).

44. 328 U.S. 256 (1946).

45. *Id.* at 258-59.

46. *Id.* at 266-67.

used for the runways themselves."[47] The case was thus decided as a type-1 (classic physical taking) fact situation, and the damages allowed were similar to severance damages allowed when there is a physical taking of property.

It is significant that the *Causby* Court held that a taking occurred whenever flights are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[48] This is, in effect, a nuisance standard.[49] Thus, although *Causby* required a physical taking in the sense of an overflight before consequential damages for noise could be recovered, it sowed the seeds for the later development of a doctrine that does not require such overflights.

Batten v. United States[50] directly addressed the situation of noise generated by airplanes not directly overhead. The district court found a substantial interference with the use and enjoyment of property and a corresponding diminution of value; it denied recovery for the noise, however, because there were no overflights, and therefore no taking under the fifth amendment.[51] Although admitting, as many of the highway cases have, that the noise, vibration, and dust affect relatively equally those whose property is overflown and those whose property is not overflown,[52] the circuit court relied on *Causby* to distinguish those damages that were "merely consequential," *i.e.*, not the result of a "taking," and those that were "the product of a direct invasion of [the property owner's] domain."[53]

Chief Judge Murrah's dissent has been cited by state courts that have done away with the physical appropriation requirement:[54]

> It is my thesis that a constitutional taking does not de-

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47. *Id.* at 262.

48. *Id.* at 266.

49. [I]t appears to be noise and glare, to the extent and under the circumstances shown here, which make the Government a seizer of private property. But the allegation of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance. . . .

Id. at 269-70 (Black, J., dissenting); *see also* Stoebuck, *supra* note 11, at 220.

50. 306 F.2d 580 (10th Cir. 1962).

51. *Id.* at 585.

52. *Id.* at 583.

53. *Id.* at 584, quoting from United States v. Causby, 328 U.S. 256, 265 (1945).

54. *See* note 59 and accompanying text *infra*.

> pend on whether the Government physically invaded the property damaged . . . . As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.[55]

This dissent has not yet been accepted by any federal court. Like the highway cases, the federal airport cases give practical significance to the proposition that "it is the character of the invasion, not the amount of damage resulting from it . . . that determines the question whether it is a taking."[56]

State Liberalization of the Overflight Requirement

Many states, particularly those without the "damaging" language in their constitutions, follow the federal rule enunciated in *Causby* and *Batten*. Others have rejected this approach and do not draw a distinction between flights that are directly overhead and those that are not. The latter group can be subdivided according to the *standard* that they apply to the taking requirement.. The *nuisance standard* requires a substantial and unreasonable interference with property, resulting in a decline in market value; the less restrictive *public benefit standard* requires only a measurable diminution in property value.

Nuisance standard. Among the states that have applied the nuisance standard are Oregon (a state without the "damaging" language in its constitution), and California (a state with the "damaging" language in its constitution).

An important early case was *Thornburg v. Port of Portland*,[57] an action in inverse condemnation brought by property owners living under and to the side of the glide paths of airplanes using the runways of the Portland International Airport. The property owners based their claims for damages from flights directly over their land and from those not di-

55. 306 F.2d at 586-87.

56. 328 U.S. at 266, quoting from United States v. Cress, 243 U.S. 316, 328 (1916).

57. 233 Or. 178, 376 P.2d 100 (1962).

rectly overhead on the same theory and authorities. Likewise, the court dealt with the two situations as one, choosing to decide the broad question, "whether a noise-nuisance can amount to a taking."[58]

The Oregon Supreme Court answered affirmatively, explicitly following the dissent in *Batten*,[59] and summed up its reasoning in general terms that seem equally applicable to the highway cases:

> If we accept, as we must upon established principles of servitudes, the validity of the proposition that noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.[60]

After the initial remand, *Thornburg* again was appealed to the Oregon Supreme Court.[61] The trial court had understood the repeated references to nuisance in the first opinion to mean that a plaintiff must survive a balancing test to recover; it therefore submitted to the jury eight instructions requested by the Port that dealt with the social utility of the airport.[62] The Oregon Supreme Court held this to be error, and clarified the standard to be applied.

> If the jury finds an interference with the plaintiff's use and enjoyment of his land, substantial enough to result in a loss of market value, there is a taking . . . . The error below was in telling the jury in effect to consider the utility of the airport in deciding whether the plaintiff's prop-

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58. *Id.* at 180, 376 P.2d at 101.

59. We believe the dissenting view in the Batten case presents the better-reasoned analysis of the legal principles involved, and that if the majority view in the Batten case can be defended it must be defended frankly upon the ground that considerations of public policy justify the result: i.e., that private rights must yield to public convenience in this class of cases. The rationale of the case is circular. The majority said in effect that there is no taking because the damages are consequential and the damages are consequential because there is no taking.

Id. at 187, 376 P.2d at 104.

60. *Id.* at 192, 376 P.2d at 106.

61. Thornburg v. Port of Portland, 244 Or. 69, 415 P.2d 750 (1966).

62. *Id.* at 71, 415 P.2d at 751.

> erty had been depreciated in value by the defendant's activities. This notion is wholly inconsistent with the law of eminent domain, and had no place in the jury's consideration of market value.[63]

In *Aaron v. City of Los Angeles*,[64] the leading California case, the state court of appeal rejected arguments grounded on the *Symons* physical appropriation approach, and expressly adopted the *Thornburg* approach. Property owners near Los Angeles International Airport brought an action in inverse condemnation to recover lost property values that resulted from jet noise emanating from the airport. The court specifically declined to adopt the federal overflight requirement, and followed the nuisance standard instead:

> The municipal owner and operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking.[65]

Several aspects of the *Aaron* opinion are particularly noteworthy with respect to the California highway cases. First, the court rejected the city's argument, based on *Symons*, that noise damage is merely consequential and therefore insufficient for a successful claim under inverse condemnation.[66] In so doing, however, the court summarily distinguished all highway cases on the ground that they involve significantly lower noise levels.[67] Second, the court admitted that "[t]here is a very close relation between the concepts of inverse condemnation and nuisance by a government entity," and then incorporated the substantial interference concept into its holding.[68] Finally, the court's holding was

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63. *Id.* at 74, 415 P.2d at 752-53.

64. 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975).

65. 40 Cal. App. 3d. at 483-84, 115 Cal. Rptr. at 170.

66. *Id.* at 482, 115 Cal. Rptr. at 169-70.

67. *Id.* at 483, 115 Cal. Rptr. at 170.

68. *Id.* at 481, 115 Cal. Rptr. at 168.

based on rarely admitted evidence in the form of a study that measured the noise levels surrounding the airport.[69] This step indicates a shift in the airport cases away from meaningless concepts of taking and towards actual interference caused. It is a step that has not been taken in the highway cases.

The cases applying the nuisance standard to inverse condemnation are the product of a movement toward more equitable criteria based not on the character of the invasion, but on the actual amount of damage done. Accordingly, where a plaintiff can show a substantial and unreasonable interference with property rights resulting in a decrease in market value, he is entitled to recover. One court that has eliminated the overflight requirement has further liberalized the law by not requiring a substantial and unreasonable interference with property rights. This court has enunciated what has been called a *public benefit standard.*

Public benefit standard. Martin v. Port of Seattle[70] was brought by property owners who lived near the Seattle-Tacoma International Airport. They alleged a decrease in market value of their property as a result of flights to and from the nearby airport. Although there was no allegation of overflight, or even of substantial interference, the Washington Supreme Court held that the plaintiffs had stated an actionable claim, equating damage, for which compensation was required, with any proven decline in the market value of real estate.[71] The court refused to apply the nuisance standard and thus rejected the idea that "the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern progressing society."[72]

Martin represents the completion of the circle in the law of inverse condemnation as it is applied in the airport cases. The pure physical invasion theory applied in the federal courts was mixed with nuisance principles in many states to achieve more equitable results. In *Martin,* more of a pure inverse condemnation theory was again applied, but paradoxically, one that was sufficiently broad to permit recovery where the federal theory and even the nuisance standard would not. Recovery has thus come to be increasingly based upon injury-

69. *Id.* at 485, 115 Cal. Rptr. at 171.
70. 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).
71. *Id.* at 320, 391 P.2d at 547.
72. *Id.* at 318, 391 P.2d at 546.

in-fact rather than arbitrary physical invasion criteria. The development of these new theories is indicative of the course the law may take in future California highway cases.

APPLICABILITY OF AIRPORT STANDARDS TO HIGHWAY CASES

The California highway cases have lagged behind the airport cases in the development of inverse condemnation doctrine that is responsive to the needs and problems of modern society. While past courts have been reluctant to apply the reasoning of the airport cases in the highway cases, the arguments against that position are becoming more persuasive; a smattering of case law indicates that things are beginning to change, especially in other jurisdictions. In California, many highway cases have not reached the appellate level; as a result, there has been little opportunity to review the current rule and expand recovery in the highway cases to the level afforded in the airport cases.[73] The issue is whether such an expansion can and should occur.

At first blush, the two classes of cases are so similar as to obviate the necessity of extensive discussion of this issue. On the most general level, both types of cases deal with the same question: To what extent must a property owner tolerate public improvements that interfere with his property rights before he is entitled to be compensated? One commentator has written: "[T]he airport cases are the spearhead of a long development that now is likely to produce general acceptance of an eminent domain doctrine at which previously a few courts have only nibbled."[74] Others have spoken of the two types of cases in virtually the same breath, implicitly acknowledging that the problems are the same.[75] Finally, the California Leg-

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73. A recent unsuccessful appeal concerned homeowners who lived along a street that was to be improved so as to serve as ingress and egress to Interstate Highway 280 for much of the city of San Carlos. The trial court sustained a demurrer to the complaint and, in an unpublished decision, the court of appeal affirmed. Crestview Homeowner's Ass'n v. City of San Carlos, 1 Civ. No. 43794 (Ct. App. Cal. Dec. 5, 1978).

74. Stoebuck, *supra* note 11, at 208.

75. Currently accepted doctrinal and procedural techniques for allocating the real costs of environmental changes resulting from the *freeway and jet transport aircraft* . . . have proven inadequate. Under the present legal regime, loss of amenities of property ownership—whether in the form of reduced accessability or increased discomfort and annoyance from externally imposed noise—frequently and routinely appear to be

islature has also spoken of the two types of problems as one—noise from transportation sources.[76] In spite of these surface similarities, however, persuasive arguments have been made that the principle of the airport cases should not be extended to the highway cases.

Different Noise Levels

There is a substantial difference between the noise generated by aircraft and the noise generated by most street and highway traffic. For example, a single jet at takeoff generates a noise level of 120 dB(A)[77] measured at a distance of 200 feet; the noise generated from a busy freeway has been measured at only 70 dB(A) at a distance of only fifty feet.[78] Although the Council on Environmental Quality has labelled noise levels above 65 dB(A) "intrusive," and those above 90 dB(A) as "damaging,"[79] courts have used this difference in noise levels as justification for rejecting the applicability of arguments drawn from one type of case to the other.[80]

To admit the existence of a difference does not, however, necessarily mean that the *principle* of the airport cases is not applicable to the highway cases. There are circumstances that raise the noise level of a particular stretch of road, or of any stretch of road at particular times of the day, to levels compa-

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translated into uncompensated financial losses in the form of diminished property values. (Emphasis added.)

Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491, 543 (1969).

76. The legislature finds that: . . . (b) The proliferation of noise from transportation sources have led to the exposure of large sectors of the populace to an unacceptable degree of noise. (c) The anticipated rates of construction of new airports and extension of existing airports, construction of freeways . . . will rapidly escalate the urban noise problem unless systematic preventive measures are taken.

CAL. GOV'T CODE § 16000 (West Supp. 1979).

77. "dB(A)" is a logarithmic measure of sound levels; the "A" scale corresponds to the frequency response of the human ear. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—1970, at 125.

78. Even this 70 dB(A) noise level exceeds noise standards issued by the Federal Highway Administration in 1973 to be used in the planning and design of freeways. The following standards were set: 60 dB(A) for land where serenity and quiet are important and serve a public need; 70 dB(A) for the exterior of residences; and 55 dB(A) for the interior of residences. 23 C.F.R. § 772.13 (1978).

79. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 77, at 125.

80. *See, e.g.*, Northcutt v. State Road Dep't, 209 So. 2d 710, 711 (Dist. Ct. App. 1968); Aaron v. City of Los Angeles, 40 Cal. App. 3d at 482-83, 115 Cal. Rptr. at 169-70; Thornburg v. Port of Portland, 233 Or. at 190-91, 376 P.2d at 106.

rable to airports. A road that is built on a steep grade will produce more noise than one that is straight and level. Furthermore, certain types of surface traffic produce more noise than other types. A 1974 study by the Environmental Protection Agency determined that a third floor apartment next to a freeway in Los Angeles is exposed to sound levels of up to 92 dB(A).[81] In cases like this, the noise may be so severe that it would constitute a taking or damaging of property in an airport noise context; nevertheless, courts would generally not allow damages in a highway situation in the absence of a physical invasion.

A general difference in the noise levels does not justify a strict physical appropriation restriction in all cases. The application of the airport standard to the highway cases would require a case-by-case determination of whether or not the noise was severe enough to constitute a taking or damaging. For this purpose evidence could be introduced relating to the diminution of property values caused by the noise. While it is likely that the proportion of successful highway suits would be smaller, the determination of whether or not a cognizable taking or damaging had occurred would more closely approximate actual harm suffered.

Torrent of Litigation

The argument has been made that streets and highways must necessarily be constructed near centers of population while airports can be removed from congested areas and still be useful.[82] Therefore, noise sufferers next to highways are merely suffering in common with the many thousands of other persons consigned to a similar fate. Some argue that if noise sufferers next to these highways were given a cause of action, a torrent of litigation would ensue.

As the airport cases illustrate, the elimination of the physical taking or damaging requirement need not lead to a torrent of litigation. Under a nuisance theory, substantial harm must be demonstrated as a prerequisite to stating a cause of action in inverse condemnation.[83] Whether or not substantial noise interference exists may be determined by us-

81. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 77, at 86.
82. 209 So. 2d at 711.
83. *See* text accompanying notes 56-69 *supra*.

ing modern noise measurement techniques.[84]

Further limiting the number of suits likely to be filed is the probability that many potential plaintiffs along an existing street or highway would consolidate their actions or bring class actions on behalf of property owners abutting a single thoroughfare. The clear community of interests has encouraged such consolidations in a number of suits involving noise from airports.[85] Finally, where the street or highway is yet to be constructed, the consideration of possible costly law suits would make it more cost efficient to construct so as to baffle excessive noise or bypass particularly susceptible geographic areas.[86]

Cost of Highway Construction

A frequently expressed argument has been that the courts must help effectuate the public policy promoting the construction of streets and highways by "seeing to it that the cost of public improvements involving the taking and damaging of property for public use be not unduly enhanced."[87] Thus, the reasoning goes, if compensation were allowed without a direct physical appropriation, the number of claims would escalate and new road and highway construction would become prohibitively expensive.

Critics of the taking requirement note that the same argument was made in favor of the overflight requirement in the airport cases.[88] The rejection of the overflight requirement in many states has not resulted in the destruction of the aviation industry. This is because the most popular substitute for the

84. *See, e.g.*, Aaron v. City of Los Angeles, 40 Cal. App. 3d at 485 n.8, 115 Cal. Rptr. at 171 n.8.

85. *See, e.g.*, Nestle v. City of Santa Monica, 6 Cal. 3d 924, 496 P.2d 480, 101 Cal. Rptr. 568 (1972), where 700 named plaintiffs brought suit for injuries caused by the operation of the Santa Monica Airport; Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975), where the suit was brought on behalf of all owners of residential property in the vicinity of the airport; City of Oakland v. Nutter, 13 Cal. App. 3d 752, 92 Cal. Rptr. 347 (1970), where 17 separate actions in eminent domain by the city against various landowners to acquire an air easement were consolidated for trial.

86. *See* text accompanying note 83 *supra*.

87. People v. Symons, 54 Cal. 2d at 861, 357 P.2d at 455, 9 Cal. Rptr. at 367, quoting from People v. Ricciardi, 23 Cal. 2d 390, 396, 144 P.2d 799, 802 (1943); *see also* Lombardy v. Peter Kiewitt Sons' Co., 266 Cal. App. 2d at 603-04, 72 Cal. Rptr. at 243.

88. Van Alstyne, *supra* note 75, at 530.

physical appropriation theory has been the application of the nuisance standard under which a successful plaintiff must show substantial and unreasonable interference with property rights.[89] While claims may increase, they would still be limited by this fundamental requirement.

Furthermore, the cost argument does not address the fact that the social costs involved in the construction and operation of a road do not disappear if there is no accountability by the public agency responsible for the road. Rather, these costs are directly borne by the abutting landowners. "The fundamental question . . . is not whether these costs will be paid; it is who will pay them."[90] There is much support among the commentators and the courts for the proposition that the costs should be paid by those who benefit from the highway, not innocent bystanders.[91]

Finally, there is some doubt about whether the courts are still implementing public policy by attempting to reduce the costs of highway construction. Recently, there has been a dramatic reduction in the amount of new highway construction, primarily due to current policies favoring fiscal restraint and environmental protection. And the California Legislature has recognized that noise from streets and highways is a factor to be considered in future transportation decisions.[92]

Certainty of Result

It has been said that requiring physical taking before recovery may be granted for noise damage provides the most accurate and predictable means of differentiating between compensable and non-compensable claims. One commentator writes:

> [The physical invasion] theory evolved in an era when conflicts were mainly confined to surface property and invisible agents of invasion were in a crude state of development, if existent. Surface property boundaries are visually

89. *See* text accompanying notes 84-85 *supra*.

90. Van Alstyne, *supra* note 75, at 543.

91. Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965); People *ex rel.* Dep't of Pub. Works v. Volunteers of America, 21 Cal. App. 3d at 128, 98 Cal. Rptr. at 435; *see also* Berger, *The California Supreme Court—A Shield Against Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W. L. REV. 199, 201-02 (1973).

92. *See* note 76 *supra*.

> discernable, and a tangible agent takes up space, so the process of invasion and occupation is a deterministic event. Theories that place tangible or physical factors at the juncture of liability ease the management of justice and thus traditionally have been favored by the law.[93]

The continuing viability of the above argument is questionable. Modern methods of measuring noise intensity will ensure that judicial or legislative standards relating noise intensity to a taking or damaging will be accurately applied in every case. In *Aaron v. City of Los Angeles*,[94] for example, it was pointed out that noise from jet aircraft is capable of being accurately measured in terms that indicate how much annoyance it causes.[95] It was partly on this basis that that court did away with the overflight requirement.[96] And the physical invasion doctrine is particularly inappropriate in an age where the effects of unseen intruders are often more damaging than those of agents with physical substance.

The arguments in favor of adopting some type of hybrid inverse condemnation/nuisance theory are now coming to the fore. The prevailing rule, embodied in the *Symons-Lombardy* line of cases, has been criticized and limited. In short, it is increasingly suggested that the arbitrary physical invasion standard be replaced by a standard that is rationally related to the injury suffered.

Other jurisdictions have explicitly recognized arguments that apply principles enunciated in the airport cases to the

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93. Alekshun, *Aircraft Noise Law: A Technical Perspective*, 55 A.B.A. J. 740, 740-41 (1969).

94. *See* text accompanying notes 64-70 *supra*.

95. It is suggested that unless recovery in inverse condemnation is limited to landowners suffering from flyover aircraft, there will be no reasonable way to draw a line to distinguish between those landowners who would have a cause of action and those who would not. The development of NEF contour areas provides a good means of drawing a reasonable line between those landowners who may establish a cause of action for inverse condemnation and those who may not. All landowners who suffer from substantially the same noise level are treated on an equal basis. Thus, all landowners located in NEF area 'C' are subjected to noise from jet aircraft which substantially interferes with residential comfort, enjoyment and use of their property and which is substantiated by the Effective Perceived Noise Level rating in decibels used to delineate NEF area 'C.'

40 Cal. App. 3d at 484 n.8, 115 Cal. Rptr. at 171 n.8.

96. *Id. See* text accompanying note 69 *supra*.

highway cases. *City of Yakima v. Dahlin*[97] was a condemnation action brought by the city to secure property for the construction of an overpass. The overpass required the construction of a concrete wall that would rise gradually to a height of twenty feet within twenty feet of Dahlin's property, a warehouse. There was to be a lane of traffic between the wall and the warehouse. The court found that, although there was no physical appropriation of property, the new construction would create an echo chamber that would elevate noise intensity to intolerable levels. Specifically citing *Martin v. Port of Seattle*,[98] the court held that the excess noise levels had reduced the market value of the property, thereby bringing the case within the damage provision of the Washington Constitution.[99]

Cheek v. Floyd County, Georgia[100] reached a similar result, although the circumstances were not as unique as *City of Yakima*. The plaintiff in *Cheek* was the owner of an apartment building and laundromat that were affected by noise, fumes, and light beams from an adjacent interchange. The court held that, if the plaintiff could show a legal nuisance and substantial injury, noise could be considered as a factor in assessing damages.[101]

In California, it seems only a matter of time before the physical invasion requirement is put to rest:

> California courts, especially, have sought to avoid a jurisprudence of classifications grounded in outmoded historical definitions of property rights, and to implement equitable loss distribution—through inverse condemnation—by a pragmatic assessment of conflicting social interests. Prominent in the accepted approach has been judicial concern that individual property owners not be compelled, in the absence of overriding justification, to bear a disproportionate share of the burdens of public improvement programs.[102]

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97. 5 Wash. App. 129, 485 P.2d 628 (1971).
98. *See* text accompanying notes 70-72 *supra*.
99. 5 Wash. App. at 133, 485 P.2d at 630-31.
100. 308 F. Supp. 777 (1970).
101. *Id.* at 782-83.
102. Van Alstyne, *supra* note 75, at 534-35 (citations omitted).

THE NEW STANDARD

Although eventual modification of the physical taking requirement in inverse condemnation as applied in the highway cases could take any one of a number of forms, it is likely the courts will follow the path laid down in the airport cases.[103] It is therefore helpful to evaluate the two prevailing variations of inverse condemnation that are applied in the airport cases and attempt to reach a conclusion as to which should be applied in California.

The *Martin* public benefit standard has only been accepted by the state of Washington.[104] Under this standard, a plaintiff need only show that the noise from a nearby highway caused a measurable, though not necessarily substantial, diminution in property value.[105] The requirement of a substantial and unreasonable interference was rejected in *Martin* on the grounds that it was inappropriate in an inverse condemnation action and connotes that "the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society."[106]

The standard enunciated in *Martin* has been applauded by some as a vindication of heretofore less important property rights at the expense of the powerful government and construction industry.

Martin, however, and its rejection of the requirement of a substantial and unreasonable interference, have been criticized on two grounds. First, by resting compensability on *any* clear showing of a diminution of property value, the *Martin* test provides no guidance as to what *degree* of harm is required before compensation can be recovered. The end result could be enlarged government liability under inverse condem-

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103. Other suggestions for modification of the physical appropriation requirement are: 1) to change it from a prerequisite for recovery for noise damage to a rebuttable presumption. *Id.* at 510; and 2) to use a distance test to distinguish noise damage which is sufficiently substantial to be compensable from that which is not. *Id.* at 517-18. This standard could be set using studies that measure noise intensities at various distances, as was done in *Aaron v. City of Los Angeles*, and would be rebuttable upon a showing of special circumstances, such as unusual topography.

104. Tondell, *Noise Litigation at Public Airports*, A.B.A. PROCEEDINGS OF THE SECTION OF THE INSURANCE, NEGLIGENCE, AND COMPENSATION LAW, (1965) at 557, 575, *reprinted in* 32 J. AIR. L. AND COMM. 387, 403 (1966).

105. Comment, *Inverse Condemnation in Washington—Is the Lid Off Pandora's Box?*, 39 WASH. L. REV. 920, 932 (1965).

106. 64 Wash. 2d at 318, 391 P.2d at 546.

nation to an extent not contemplated by the Constitution; the fears of those who voice the view that the elimination of the physical taking or damaging requirement would bankrupt the government could be realized. So, the elimination of the physical taking or damaging requirement must be accompanied by the institution of a theory which will protect the government from incidental claims, but which will do this in a way that is rationally related to the damage claimed.

Also, by creating a right of recovery against the government for a taking or damaging of property, the state did not intend to create any more rights than a plaintiff would have against a citizen who constructed improvements on adjoining property.[107] *Martin* allows recovery for *any* decline in market value where the defendant is a public entity. However, private landowners are normally entitled to use their land in ways that may adversely affect the value of adjoining land, with liability turning on a finding of substantial interference with property rights.[108]

Given the present state of the law in California, it is unlikely that a radical departure, such as *Martin*, will be attempted initially. As indicated above,[109] the nuisance theory is a compromise between the strict physical invasion theory and the very liberal public benefit theory. Its primary appeal lies in the fact that it permits a rational determination of whether a claim for noise damage is compensable; at the same time, it avoids the pitfalls of the public benefit theory by retaining some threshhold requirement for stating a cause of action. More important, the nuisance theory has already been em-

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107. People v. Symons, 54 Cal. 2d at 861-62, 357 P.2d at 455, 9 Cal. Rptr. at 367. It is important to note that the California courts are not in accord on this point. For example, the first court to construe the word "damaged" in the California Constitution stated:

> We are of the opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage under this provision. This provision was intended to assure compensation to the owner, as well where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at the common law.

Reardon v. City and County of San Francisco, 66 Cal. 492, 505, 6 P. 317, 325 (1885).

108. PROSSER, TORTS § 89, at 596-98 (4th ed. 1971).

109. *See* text following note 72 *supra*.

braced by the California judiciary in *Aaron v. City of Los Angeles.*[110]

Furthermore, the California Supreme Court has recently extended the application of the nuisance standard to a class of cases involving odors from sewage treatment plants, another source of non-physical interference. In *Varjebedian v. City of Madera,*[111] the court held that fumes may cause a taking or damaging of property if they constitute a *substantial burden* on the property.[112] This result is a departure from earlier cases involving similar interferences that required a physical taking or damaging.[113]

The nuisance standard has thus been adopted in at least two classes of cases that at one time required a physical taking or damaging as a prerequisite for recovery for non-physical damage. People who suffer from noise damage caused by automobiles on nearby streets and highways are now uniquely required to allege and prove such a physical invasion. The extension of the nuisance standard to the highway cases would permit homeowners in these cases the same rights as noise sufferers next to airports and people like the Varjebedians in the sewage treatment plant context; the result would be a more consistent application of inverse condemnation to cases

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110. *See* text accompanying notes 64-70 *supra.*

111. 20 Cal. 3d 285, 572 P.2d 43, 142 Cal. Rptr. 429 (1978).

112. *Id.* at 297, 572 P.2d at 51, 142 Cal. Rptr. at 437.

113. *See, e.g.,* County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935). In this eminent domain proceeding, the sanitation district brought suit against Averill for the purpose of acquiring a right-of-way for an outfall sewer into the Pacific Ocean. Averill sought damages for the value of the property taken as well as damages resulting from the odors and gases that would be blown over his property from the area where the sewage was deposited in the ocean, almost a mile from shore. The court, however, denied Averill's offer of evidence to prove the damages resulting from the gases and odors. In a passage later cited in *People v. Symons,* the court noted:

> An owner, whose land is being condemned in part, may not recover damages in the condemnation action to the remainder of his land caused by the manner in which the works are to be constructed or operated on the lands of others.

Id. at 561, 47 P.2d at 788. Further, the court held:

> [A]ny detriment which may be suffered by the defendant in the future, occasioned by the wafting of odors from the sewer shoreward . . . not discharged from that portion which crosses his land, may not be recovered in this action by way of damages to his land. *The supposition that the sewer will be operated so as to become a nuisance is immaterial to the issue of damages for the taking of the land.* (Emphasis added.)

Id. at 563-64, 47 P.2d at 789.

involving non-physical damage to property in California. It is therefore a step that can and should be taken.

CONCLUSION

The time is ripe for change in California. *People v. Symons* came under immediate attack when it was decided. The line of decisions that it engendered has been limited, and has provoked strong words of disagreement from the California courts of appeal because it sets an arbitrary standard for determining compensability for noise emanating from streets and highways. Recently, the California Legislature spoke on the issue and indicated an intent to move away from meaningless concepts of physical invasion when the inquiry involves damage from non-physical agents.

Unlike the highway cases, the airport cases have shown an evolution of legal doctrine whereby physical appropriation theories have been abandoned in many states, including California, and replaced with theories that determine whether noise has resulted in a taking or damaging according to the degree of interference with enjoyment of property. Accordingly, in many states, airport noise that amounts to a nuisance may constitute a taking or damaging of property.

The arguments that once seemed to rationalize the inconsistency of application of inverse condemnation to airport and highway cases have now receded. Different levels of noise in the two situations do not justify the application of different standards. Fears that the courts would be burdened with large numbers of law suits are unfounded, given the requirement of substantial and unreasonable interference and the possibility of consolidation of suits and class actions. The argument that the adoption of the new standard would make future highway construction fiscally unsound ignores the fact that the rate of construction is rapidly decreasing; this argument further ignores the issue of the social costs of highway construction and operation. Finally, modern methods of measuring noise intensity that have been successfully applied in airport cases will provide a means of accurately determining when noise becomes so intense as to constitute a substantial interference.

California should therefore extend the principles enunciated in cases such as *Aaron v. City of Los Angeles* to the highway situation. Under the nuisance standard, a plaintiff would recover whenever the noise coming from the highway

amounted to a substantial and unreasonable interference with enjoyment of his property. The substantiality of the interference could be determined with the use of modern measurement techniques, taking into account special circumstances such as the surrounding topography.[114] An interference would be held to be unreasonable whenever a property owner, if uncompensated, would bear more than his fair share of the public burden.[115] With present policy tending to favor the claims of abutting landowners who have been singled out to bear an unfair share of the cost of nearby streets and highways, these plaintiffs would face better prospects for compensation.[116] Recovery would be rationally related to the degree of harm caused, and would not be dependent upon an arbitrary standard immutably tied to a physical appropriation.

Donald S. Black

114. *See* text accompanying notes 69 & 95 *supra*.
115. *See* text accompanying note 65 *supra*.
116. *See* text accompanying note 92 *supra*.